# Guideline Sentencing Update

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## Departures

### Substantial Assistance

Ninth Circuit holds that government's improper behavior authorized district court to grant §5K1.1 departure without government motion. Before and during defendant's plea proceedings his counsel attemptedto negotiate a plea agreement, whereby defendant would testify against other defendants in exchange for a §5K1.1 departure. The government refused the offer, but then, without notifying defendant's counsel, subpoenaed defendant to testify at a grand jury hearing. Defendant contacted his attorney, who tried to contact the prosecutor, who did not return the phone calls. Counsel could not contact defendant, either, because the government had moved defendant to another prison. Assuming that his attorney had reached the prosecutor and struck a deal for a departure, defendant testified before the grand jury. At defendant's sentencing the government refused to file a §5K1.1 motion, although it did file one for a codefendant who testified before the same grand jury.

The appellate court remanded, rejecting the government's argument that "its potentially unconstitutional *behavior* (interfering with defendant's Sixth Amendment rights) is not an 'unconstitutional motive' within the meaning of [*Wade v. U.S.*, 112 S. Ct. 1840 (1992)], and that a downward departure is not an appropriate remedy for such misconduct." The court held that defendant "has shown that he provided substantial assistance, and that the government's improper conduct deprived him of an opportunity to negotiate a favorable bargain before testifying. Allowing such potentially unconstitutional behavior to go unremedied creates troubling incentives. Although no cases have squarely addressed Hier's situation, the government's behavior in this case authorizes the district court to grant Hier's request for a downward departure."

*U.S. v. Treleaven*, 35 F.3d 458, 461–62 (9th Cir 1994).

See *Outline* at VI.F.1.b.iii.

Fifth Circuit holds that district court must make independent determination of extent of §5K1.1 departure. Defendants received downward departures under §5K1.1, but argued on appeal that the district court's comments indicated that, as a matter of policy, the court would not depart more than the ten months the government recommended. The appellate court remanded. "Although the court referred to its power and discretion in determining whether and to what extent to depart, the record leaves open the question whether the court also adequately recognized its duty to evaluate independently each defendant's case . . . . The court is charged with conducting a judicial inquiry into each individual case before independently determining the propriety and extent of any departure in the imposition of sentence. While giving appropriate weight to the government's assessment and recommendation, the court must consider all other factors relevant to this inquiry."

*U.S. v. Johnson*, 33 F.3d 8, 10 (5th Cir 1994).

See *Outline* at VI.F.2.

### Aggravating Circumstances

Second Circuit holds that likely fate of smuggled aliens after reaching U.S. may be considered in departure decision. Defendants were convicted of conspiring to bring 150 illegal aliens into the U.S. from China. The district court departed upward, partly based on the likelihood that, had the scheme succeeded, the illegal aliens would have been subject to "involuntary servitude" to pay off their debts to the smugglers. The appellate court affirmed. "Testimony at trial established that . . . each of the 150 aliens would be indebted to the smugglers in amounts ranging from $10,000 to nearly $30,000. A contract to pay smuggling fees, unenforceable at law or equity, necessarily contemplates other enforcement mechanisms, none of them savory. It requires no quantum leap in logic to infer from these established facts that these huge debts would be paid through years of labor under circumstances fairly characterized as involuntary servitude."

*U.S. v. Fan*, 36 F.3d 240, 245 (2d Cir 1994).

See *Outline* generally at VI.B.1.j.

## Offense Conduct

### Mandatory Minimums

Eighth Circuit holds that quantity of LSD for mandatory minimums should be calculated under amended guideline method. Defendant pled guilty to conspiracy to distribute LSD and stipulated that the weight of the drug and carrier medium was over ten grams. This subjected him to a ten-year manda-

tory minimum under 21 U.S.C. §841(b)(1)(A)(v), but with a substantial assistance departure he was sentenced to 72 months. Guideline Amendment 488 (Nov. 1, 1993) changed the method of calculating the weight of LSD and carrier media, *see* §2D1.1(c) at n.* and comment. (n.18 and backg'd), and made it retroactive under §1B1.10. Using the amendment would lower defendant's sentencing range to 33–41 months. The court declined to reduce the sentence, however, concluding that defendant was still subject to the mandatory minimum term and, although the sentence was below the minimum because of defendant's substantial assistance, it could not be reduced further based on the amended guideline.

The appellate court agreed that it would be improper to "piggyback" the amended calculation onto the substantial assistance reduction, but held that the calculation for the mandatory minimum quantity itself should be based on the amendment. "In *Chapman v. U.S.*, 500 U.S. 453, 468 . . . (1991), the Supreme Court construed 'mixture or substance' in [§841(b)(1)(A)(v)] as 'requir[ing] the weight of the carrier medium to be included.' . . . Amendment 488 merely provides a uniform methodology for calculating the weight of LSD and its carrier medium—the 'mixture' or 'substance' containing a detectable amount of LSD."

The court concluded that "Amendment 488 and Section 841 can and should be reconciled under *Chapman*. . . . To calculate mixture weights differently for mandatory minimum sentences on one hand and guideline sentences on the other would unnecessarily swallow up the guideline, which, itself, demands a very significant sentence. Applying two different measurements makes no sense. Accordingly, we find that Stoneking's sentence may be reduced under a retroactive application of Amendment 488." *Contra U.S. v. Boot*, 25 F.3d 52, 54–55 (1st Cir. 1994) [6 *GSU* #15]. Because retroactive applicationof an amendment is not mandatory, it remains for "the district court to determine, in its discretion, whether Amendment 488 should be applied retroactively to reduce Stoneking's sentence."

*U.S. v. Stoneking*, 34 F.3d 651, 652–55 (8th Cir 1994).

See *Outline* at I.E, II.A.3, and II.B.1.

## Loss

Third Circuit holds that loss from check kiting scheme is not reduced by amounts repaid after offense is discovered. Defendant pled guilty to bank fraud through check kiting. When the crime was detected the loss amounted to over $460,000. The district court reduced that sum to under $350,000, however, to reflect payments defendant made to some of the victim banks by the time he was sentenced. The appellate court remanded. "We believe that check kiting crimes, because of their particular nature, are crimes where the district court must calculate the victim's actual loss as it exists at the time the offense is detected rather than as it exists at the time of sentencing. . . . By its very nature, the crime of kiting checks ordinarily involves the borrowing of funds without authorization from the bank and without the offender providing any security to protect the bank against risk of loss. This distinction warrants treating perpetrators of check kiting loan frauds in most cases differently from perpetrators of secured loan frauds for sentencing purposes." Thus, "the gross amount of the kite at the time of detection, less any other collected funds the defendant has on deposit with the bank at that time and any other offsets that the bank can immediately apply against the overdraft (including immediate repayments), is the loss to the victim bank."

*U.S. v. Shaffer*, 35 F.3d 110, 113–14 (3d Cir 1994). *See also U.S. v. Mummert*, 34 F.3d 201, 204 (3d Cir 1994) (affirmed: where defendant arranged fraudulent unsecured loan to finance construction of house by third party, loss is not reduced by third party's offer to repay bank after sale of house or sign house over to bank—"A defendant in a fraud case should not be able to reduce the amount of loss for sentencing purposes by offering to make restitution after being caught"). Cf. *U.S. v. Bennett*, 37 F.3d 687, 695 (1st Cir. 1994) (remanded: error to reduce loss by amount repaid as part of civil settlement after fraudulent loan scheme was discovered).

See *Outline* at II.D.2.b and c.

Tenth Circuit holds that amount of loss is not reduced by fraud victims' tax benefits. Defendant defrauded dozens of investors of several million dollars. He argued that the amount of loss should be reduced by $2 million for tax benefits the victims obtained through their investments. The district court refused to do so and the appellate court affirmed: "Defendant cites no authority in support of his novel proposition, and we have found none. In previous cases where we have deducted the value of something the victim has received in computing actual loss, Defendant himself has been responsible for the victim's receipt of something of value. . . . Because the Sentencing Commission did not [allow for such a reduction], and because no Tenth Circuit or other precedent supports Defendant's argument to reduce the amount of loss by a victim's tax savings, we reject Defendant's argument."

*U.S. v. McAlpine*, 32 F.3d 484, 489 (10th Cir 1994).

See *Outline* at II.D.2.d.

# Adjustments

## Acceptance of Responsibility

Seventh Circuit affirms denial of §3E1.1 reduction for silence on "conduct comprising the offense of conviction." Defendant pled guilty to credit card offenses. The district court denied a reduction for acceptance of responsibility because defendant refused to answer questions concerning how she arrived in Wisconsin, where she obtained the counterfeit credit cards, and the source of money recovered at her arrest that exceeded the amounts she had obtained in the charged offenses. Defendant had invoked the Fifth Amendment on these issues and argued that §3E1.1, comment. (n.1(a)), allowed her to do so without penalty ("A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection.").

The appellate court affirmed the denial, although it agreed with defendant that her silence regarding the money that exceeded the amount in the offenses of conviction was protected under Application Note 1(a). "There is, however, an important distinction between Hammick's silence concerning the source of the excess cash . . . and her silence concerning [her] means of travel to Wisconsin and the source of the counterfeit credit cards and other documents she used to commit the offenses to which she pleaded guilty." Note 1(a) also indicates that a defendant must "truthfully admit[] the conduct comprising the offenses of conviction." "The district judge's request that Hammick explain how she was able to carry out her crimes required no more than 'a candid and full unraveling' of the conduct comprising her offense of conviction, . . . and thus did not violate her right to remain silent concerning relevant conduct *beyond* the offense of conviction under the current version of the guideline."

*U.S. v. Hammick*, 36 F.3d 594, 600–01 (7th Cir 1994) (Bauer, J., dissented).

See *Outline* at III.E.3.

Ninth Circuit indicates defendant should notify government of intent to plead guilty in order to secure§ 3E1.1(b) reduction for timely assistance. Defendant received the two-point reduction under §3E1.1(a), but was denied the extra point under §3E1.1(b) because he did not plead guilty until one week before trial and "after the government had begun seriously to prepare for trial." Defendant argued he had waited until the court ruled on his motion to dismiss on double jeopardy grounds, and should not be denied the extra reduction because the court did not decide the motion earlier or because he exercised his constitutional rights.

The appellate court affirmed. "While Narramore may well have intended to plead guilty in the event that his motion to dismiss was denied, he at no time approached the government with this information so the trial preparation could have been avoided. Nothing prevented him from doing so. Narramore's pretrial motion, if granted, would have completely obviated trial. Accordingly, if Narramore had earlier communicated his willingness to enter a plea, the government would have had no reason to prepare for trial. In such circumstances, his plea cannot be considered timely for purposes of §3E1.1(b)." As for defendant's constitutional argument, "[i]ncentives for plea bargaining are not unconstitutional merely because they are intended to encourage a defendant to forego constitutionally protected conduct. . . . [B]y advising the government of his intent to plead guilty if his trial motion were denied, Narramore could have enabled the government to avoid trial preparation" and qualified for §3E1.1(b).

*U.S. v. Narramore*, 36 F.3d 845, 846–47 (9th Cir 1994).

See *Outline* at III.E.5.

# Criminal History

## Armed Career Criminal

Sixth Circuit holds that enhanced penalty in §4B1.4 for possessing firearm "in connection with a crime of violence" does not require conviction for that crime of violence. Defendant was convicted of being a felon in possession of a firearm and, because of prior convictions, was subject to sentencing as an armed career criminal under 18 U.S.C. §924(e) and §4B1.4. The district court found that defendant possessed the firearm "in connection with a crime of violence" (an assault) and increased the offense level and criminal history category under §4B1.4(b)(3)(A) & (c)(2). Defendant appealed, arguing that the increases did not apply because he was not *convicted* of the assault in connection with the unlawful possession.

The appellate court affirmed, concluding that "a conviction for a violent crime is not a prerequisite to application of this section. . . .Where the drafters of the guidelines intend that a defendant must have been convicted of a particular crime if a particular provision of the guidelines is to be applied, they generally say so explicitly. . . . No corresponding term appears in the definition of an 'armed career criminal,' the category at issue here."

*U.S. v. Rutledge*, 33 F.3d 671, 673–74 (6th Cir 1994).

See *Outline* at IV.D.

### Challenges to Prior Convictions

Ninth Circuit holds that *Custis* applies to challenges under Guidelines. The district court denied defendant's challenge to a prior conviction that increased his Guidelines sentence. Basing its decision on §4A1.2, comment. (n.6), and *Custis v. U.S.*, 114 S. Ct. 1732 (1994), the appellate court affirmed. "We conclude that Burrows had no right conferred by the Sentencing Guidelines to attack his prior convictions in his sentencing proceeding and no constitutional right to attack any prior convictions save those which were obtained in violation" of the right to counsel. Although *U.S. v. Vea-Gonzales,* 999 F.2d 1326 (9th Cir. 1993), held that defendants have a constitutional right to challenge prior sentences, "as far as its constitutional holding goes, *Vea-Gonzales* is no longer good law" in light of *Custis*.

*U.S. v. Burrows,* 36 F.3d 875, 885 (9th Cir 1994).

See *Outline* at IV.A.3.

## Determining the Sentence

### Consecutive or Concurrent Sentences

Ninth Circuit holds that courts must consider, but are not strictly bound by, the methodology in §5G1.3(c), comment. (n.3). Defendant was serving a state sentence at the time he was to be sentenced for an unrelated federal offense. To determine the extent to which the federal sentence should be consecutive to the state sentence, the district court followed the procedure in §5G1.3(c), comment. (n.3), and approximated "the total punishment that would have been imposed under §5G1.2 . . . had all of the offenses been federal offenses for which sentences were being imposed at the same time." The resulting guideline range was less than defendant was to serve on the state sentence. As an alternative, the court departed downward from defendant's criminal history category by discounting the state conviction and arrived at a sentencing range of 18–24 months. The court sentenced defendant to 18 months, to run consecutively to the state term, making defendant's "incremental punishment" for the federal offense 18 months.

Although the district court neither strictly followed Note 3 nor specifically explained why it did not use the recommended calculation, the appellate court affirmed. A "review of the history of §5G1.3 supports the inference that its current language is intended to give sentencing courts leeway in deciding what method to use to determine what a reasonable incremental penalty is in a given case. . . . Although the district court no longer has complete discretion to employ any method it chooses when it decides upon a reasonable incremental penalty, neither is it required to use the commentary methodology or else depart from the Guideline. . . . True, the court must attempt to calculate the reasonable incremental punishment that would be imposed under the commentary methodology. If that calculation is not possible or if the court finds that there is a reason not to impose the suggested penalty, it may use another method to determine what sentence it will impose. The court must, however, state its reasons for abandoning the commentary methodology in such a way as to allow us to see that it has considered the methodology. . . . Applying these principles to the case at hand, it becomes clear that the district court did everything it was required to do. . . . It did need to consider the methodology and it did need to give its reasons for using an alternative method." Cf. *U.S. v. Coleman*, 15 F.3d 612–13 (6th Cir. 1994) (remanded: courts must consider §5G1.3(c) and, "to the extent practicable," utilize methodology in Note 3).

*U.S. v. Redman,* 35 F.3d 437, 440–42 (9th Cir 1994).

See *Outline* at V.A.3.

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